Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-577

SHANTILAL VALAND,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE, NEWARK, NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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PETITIONER'S STAY WAS NOT UNAUTHORIZED

The respondent in its brief contends that the petitioner was authorized to remain until January 15, 1976. He remained in the

United States beyond that date. But, this argument has no bases. Petitioner's application for adjustment of status was denied by the District Director on December 15, 1975, but neither an order of deportation was entered against him by District Director nor an order to show cause was served upon the petitioner commencing deportation proceedings.

The Act gives a right to an alien to renew his application before the Immigration Judge in a deportation proceeding and apply for a discretionary relief. The petitioner cannot avail himself of this right if he leaves the country. 8 CFR 245.2(a)(3) provides as follows:

> "The departure from the United States of an applicant for permanent resident status under section 245 of the Act or this part who is under deportation proceedings shall be deemed an abandonment of his application constituting grounds for termination thereof if the deportation proceeding is terminated by reason of the departure.

> "The departure of an applicant who is not under deportation proceedings shall be deemed an abandonment of his application constituting grounds for termination thereof . . ."

It is evident from the aforesaid provision that the departure of the petitioner would have amounted to the abandonment of his application for adjustment of status from visitor to that of a lawful permanent resident of U.S.A.

The petitioner received labor certification on or about May 3, 1974 and immediately applied for adjustment of status. Thereafter, there were continuous proceedings on this application to date. Petitioner's departure would have amounted to abandonment of his application. Therefore, to say that petitioner remained in the United States beyond that date without authorization is incorrect. Additionally, the Court will please note that Appeal to the Board of Immigration and Review Application to the Court of Appeals automatically

stays deportation. 8 CFR 3.6(a) and U.S.C. 1105a(a)(3).

NON COMPLIANCE WITH
8 CFR 242.16(d) HEARING

The respondent has, in its brief, page 9, paragraph starting with (c), contended that Immigration Judge has made all the necessary findings to support a willful and material misrepresentation to induce entry that would justify exclusion of petitioner pursuant to 8 U.S.C. 1182(a)(19).

The petitioner contends that such findings are in violation of the mandate of 8 CFR 242.16(d). Said regulation reads as follows:

> "A trial attorney who has been assigned to a case may at any time during a hearing lodge additional charges of deportability, including factual allegations against the respondent. The additional factual allegations and charges shall be submitted in writing and entered as an exhibit in the record. The special inquiry officer shall read the additional

> factual allegations and charges to the respondent and explain them to him in non-technical language. The special inquiry officer shall advise the respondent if he is not represented by counsel that he may be so represented and also that he may have a reasonable time within which to meet the additional factual allegations and charges. The respondent shall be required to state then and there whether he desires a continuance for either of these reasons. Thereafter, the provisions of paragraph (b) of this section shall apply to the additional factual allegations and lodged charges."

If during the hearing Immigration Judge or the Trial Attorney noticed that evidence has come on record which requires findings as to fraud or willful and material misrepresentation, then each should have followed mandate of 242.16(d), and thereafter Immigration Judge should have followed 242.16(b): pleading by respondent:

> "The special inquiry officer <u>shall</u> require the respondent to plead to the order to show cause by stating

whether he admits or denies the factual allegations and his deportability under the charges contained therein."

In this case, the charge is only under section 241(a)(2): Non-Immigrant visitor remained longer than permitted. See appendix "A" page 1a to the petition. There is no charge under section 8 U.S.C. 1182(a)(19). A review of entire record indicates that the Immigration Judge has failed to comply with aforesaid mandatory provisions.

By failing to follow 8 CFR 242.16(d) & (b), the Immigration Judge denied the petitioner procedural due process of law.

PETITIONER DID CHALLENGE THAT IMMIGRATION JUDGE HAS ABUSED DISCRETION AND HIS DECISION WAS ARBITRARY, CAPRICIOUS AND IMPROPER.

The respondent has in its brief con-

tended that the petitioner has not challenged that Immigration Judge has abused his discretion or his decision was arbitrary and capricious. This contention shows that the respondent has not read the entire record before preparing their brief in opposition.

In fact, the petitioner has, in his brief submitted to the Board of Immigration Appeals and to the Third Circuit, challenged such findings together with other findings of Immigration Judge referred to by the respondents in its brief herein. Such challenges are included in Point 1 through 15 of the petitioner's brief submitted to the Third Circuit. If this Court analyses the entire record, it will become clear that the Immigration Judge's findings do not satisfy the requirement of 8 CFR 242.14:

EVIDENCE:

"A determination of deportability

> shall not be valid unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true."

INS v. BAGAMASBAD

The respondent has in its brief on page 10 cited INS v. Bagamasbad. But, facts in that case were different in that representations in that case were materially and willfully false whereas in this case the representation as 'farmer' at visitor's visa application and as 'butcher' at subsequent extension of stay application in this country were neither material nor willfully false. As contended in point 9 of petitioner's brief before Third Circuit, on pages 26 through 30. None of the representation was used to induce Secretary of Labor to issue labor certification or to INS to adjust the status. Petitioner's family busi-

ness was farming but he also worked as a clerk in the Army. The record, as it is, does not support finding of material or willfully false representation. Besides, the petitioner has challenged such findings before the Third Circuit.

The Form MA 7-50B (Admn. Record: Ex. 3, pages 163 & 164: Item 30) containing representations as to "electric typewriter" and "dictation equipment" is neither prepared nor signed by the petitioner. He has no knowledge of what is said on this Form. Therefore, to say that he made aforesaid representations is not correct and is not supported by the record and cannot be held against him.

ORAL ARGUMENTS

The respondent on page 10 paragraph

numbered 2 contends that in administrative contact, this Court has held to the effect that constitution does not require oral argument. But, in this case, there was a specific request and such request was made because there were findings which can only be put to the Court's attention at an oral argument by referring to actual pages, lines and language of the Transcript. Besides, petitioner wanted to discuss in detail rationale of Castaneda - Gonzales, by analyzing the various aspects of that case, and 8 CFR 242.16(d) & (b). Again, this was not a frivilous review application. It contained a Landmark decision which required from the Third Circuit something more than a three-line decision. The Court will please note that the Third Circuit decision was made on April 12, 1978 and Immigration & Naturalization Service accepted holding in Castaneda - Gonzales

by Board decision of April 25, 1978. Allowance of the oral argument would have given an opportunity to the petitioner to point out this decision to the Court.

Why did the Third Circuit refrain from commenting on Castaneda - Gonzales? Was not it a decision of another Court of Appeals?

The fact remains that, in Matter of Kim, decided by the Board of Appeals, the Immigration & Naturalization Service has accepted as a rule of general applicability the holding in Castaneda - Gonzales v. INS.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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